THE PROPRIETARY PROVINCE AS A FORM OF COLONIAL GOVERNMENT

II.

HAD governmental powers not accompanied the territorial grants which have already been described, those grants would have lain wholly within the domain of private law. They would have been estates of land, unusually large, no doubt, but nothing more. In cases where the governmental rights of proprietors were suspended [1] or resigned into the hands of the crown, they remained thereafter only private landlords. But the fact that rights of government were bestowed with the land gives to the regulations concerning the latter a significance in constitutional history. The proprietor was made thereby the political head of his province. In fact, the territory became a province by virtue of the rights and institutions of government existing in and connected therewith. The existence and exercise of these rights made the income from the land of the province public revenue. When that revenue was expended it was a public expenditure. The bestowment of grants of land by the proprietor not only carried with it the obligation to pay quit-rent, but to take to him the oath of fidelity. Had it been possible for a territorial nobility to develop in the American provinces its creation would have shown here, as in Europe, how the granting of land could have been utilized as a means of strengthening the government and checking the growth of democracy.

In the discussion of the corporation as a form of colonial government it was necessary to dwell first and chiefly on the legislature. The general court was the central feature of that organism, for in that the freemen, who were the grantees of power, found their embodiment. But with the proprietary province the case is different. The king established that by delegating to the proprietor the right to exercise certain functions of the prerogative within the province. It is true that the proprietary charters contained more hints concerning the form of government which should obtain in the province

[1] The governmental rights of Baltimore were suspended in 1690 and so remained till 1715. Those of Penn were in suspension during the years 1693 and 1694. The New Jersey proprietors seem never to have been in undisputed possession of rights of government. After such rights as they claimed were in 1702 surrendered to the crown they remained formally as well as really private landlords.

than did the charters of corporations, but they were only hints. The existence of an assembly, and hence the enjoyment of political rights by the colonists, was not in any of the charters guaranteed in specific and mandatory terms; in one, that of New York, it was not mentioned. The powers which were definitely bestowed were executive in character, the ordinance power, the power to appoint all officers, to establish courts, to punish and pardon, to organize a military force and defend the province, to bestow titles of honor, to found churches and present to livings. These made the proprietor the executive of the province and for the most part left it to him to determine how and in what forms the governmental powers which he had received should be exercised. That he did this alone, without advice, or apart from the social and political conditions of the problem, is not claimed. That in none of the provinces, save New York, was there or could there have been much delay in calling an assembly, is true. But in all cases the assembly was called by the proprietor, and without such action of his it could not legally meet. What control he had over its organization and work, when once in existence, will appear in the sequel. The fact here insisted upon is that the bestowment of power upon an individual instead of a corporation assembled in general court, and its transmission through him to the colonists, made the executive, instead of the legislature, the centre from and around which development in the province chiefly occurred. It gave to the proprietor an importance, especially at the outset, which was analogous to that enjoyed by the general court in the corporate colony. It made him in a derived and inferior sense the source, within the province, of office and honor, the fountain of justice, the commander of the military, the recipient of the provincial revenue, the constituent part of the legislature. These were the *jura regalia* of the proprietor, which made his position that of a count palatine. They were in kind the powers of the English monarch, and, when used according to the precedents of the county palatine, made the province monarchical in form.

Of the proprietary provinces which obtained permanent form and development, Maryland was founded prior to the Restoration, while all the rest were established subsequent to that event. The Calverts and the Duke of York were the only proprietors who did not issue elaborate concessions as to government. As we have seen, they all published the terms on which they would grant land; the Carolina and New Jersey proprietors and Penn made similar announcement of the conditions under which government should be administered. With one exception,—the Fundamental Constitutions

of Shaftesbury and Locke,—these documents have a decidedly modern form and purport. They were apparently issued for the purpose of attracting settlers, and may have contained features which were suggested by those who expected to live as colonists under them. They approach as near formal compacts as is possible in the case of documents within the domain of public law. One cannot imagine a medieval count palatine issuing to his vassals such grants as these. In them the organs of the government which it was proposed to establish, and their powers, were described, in some cases very minutely, while provisions for amendment were included. They were in fact *octroi* constitutions, and were issued as an expression of the will of the proprietor, but also with a view to the interests and demands of those who, under new and strange conditions, were to inhabit the provinces. In these constitutions then we note the first significant innovation in matters of government which occurred when the palatinates were reproduced in the American colonies. The Calverts and the Duke of York by refraining from their issue kept more strictly in the line of precedent, and on that account, for a time at least, they were able better to control the dispensing and the exercise of political power. They conceded less at the outset than did the proprietors of Carolina, New Jersey and Pennsylvania.

As the proprietors themselves were the most important agents in these initial transactions, their views and habits must be taken into account in judging the events themselves. A study of the documents reveals the fact that the affairs, particularly of Maryland and New York, were guided by men whose minds were trained in the law and traditions of English administration. The proprietors of these provinces were men of this class. Hence with them there was an adherence to legal forms, a steadiness and precision in the conduct of business, which the records of the other proprietary provinces do not reveal. The Baltimore family, while in control, seems to have devoted its attention more carefully and continuously to the administration of its province than did any of the other proprietary grantees. The attention of the leading Carolina proprietors was diverted from their colonial interests by cares of state, while, especially after the death of Shaftesbury, the fact that there were eight of them instead of one detracted greatly from their efficiency. But they had no ideals which were inconsistent with the traditional monarchical system as reproduced in the province. The same cannot be said of Penn and of the members of the proprietary boards of East and West Jersey. Penn was not a lawyer, neither was he a specially able administrator. The proprietors of

the Jerseys, particularly of West Jersey, became very numerous, and many of them settled in their provinces. There, as in Pennsylvania, Quakerism and various other forms of religious dissent entered as elements which strengthened democratic tendencies among the people. Dissenters were also numerous in the Carolinas, and at one time Puritans made considerable trouble for Baltimore. But in Pennsylvania the first proprietor was himself a Quaker; the entire board of West Jersey was of that persuasion, while the sect was strongly represented among the grantees of East Jersey. The social position, the training, the spirit, the religious beliefs of the Quaker did not conspicuously fit him for maintaining the traditional forms of provincial government. When he became a proprietor there was likelihood that the provincial system would be modified at its very source; that institutions would be thrown, as it were, into solution, and seem more ready than elsewhere to assume the democratic form. In the Quaker provinces proprietors and people more nearly agreed in their ideals than they did elsewhere. Penn, to his cost, relied more on personal influence than he did on institutions as a means of retaining control over his province. In the Jerseys, moreover, the difficulties of maintaining the proprietary system were vastly increased by the number of proprietors and by the doubt which hung over their claim to governmental power. Their history shows how it was possible by weakening and obscuring the executive to change this form of government into that of the commonwealth. Thus it appears that in the domain of government the proprietary provinces had each its individuality, and that this was in part due to the character and position of the proprietor. It is believed that Maryland approaches the nearest of all to the model, and so its history may chiefly be relied upon to illustrate the features of the system.

The effective exercise of governmental power by the proprietor began with the appointment of the governor. It was mainly through this official that the powers of the proprietor were exercised in the province. He was the proprietor's commissioner, or, to use a term of private law, his agent, for all purposes of government. Power was transmitted to him by a commission, and he was guided in the use of it by instructions. Instructions might be given him at the time of his appointment, or also at any later period. The letters written by the proprietor to his governor were of the nature, though not in the form, of instructions. The governor in return was expected to report his doings to his superior and keep him informed concerning affairs in the province. The governor, like all other officials, held office at the proprietor's pleasure, and was in no re-

spect legally independent of him. There was no department or phase of his activity wherein he was not legally subject to the control of the proprietor, though at the same time it is true that such control was often loosely exercised. In order then to the existence of proprietary government it was not necessary that the proprietor should reside in the province. Wherever the governor was, there was the proprietor. The governor brought the proprietor into the province, for every public act of the governor, if legally performed, was done in the name and by the authority of his superior. Anything which the proprietor could lawfully do he could require his governor to do, and at the outset the proprietor was limited only by the very general, though in the sphere of private rights, the comprehensive, terms of his charter. In the provincial system then provision was made for instructions before it was made for legislation, and it was only through instructions that legislation could legally begin and be continued. Instructions were as normal and regular a part of the system as was law-making. Not only were they sent to the governor, but, when necessary, to all other officials appointed by the proprietor. Any official in the province might send them to his subordinate.[1]

That this is a true account of the legal relations existing between the governor and the proprietor might be proved by citations at great length from the records of all the provinces. The first governors of Maryland and Pennsylvania were appointed before any of the colonists left England,[2] and Lord Baltimore then gave to his appointee full instructions concerning the voyage and the making of the first settlement. We know that in 1664[3] a commission and instructions were sent to William Drummond, the first governor of Albemarle County, in Carolina, though the documents have been lost. The commission of Sir John Yeamans, the first governor of Clarendon county, is extant.[4] It is accompanied by instructions concerning the granting of land, in which it is specified that the powers should be exercised in the name of the proprietor and according to conditions and instructions proceeding from him. The instructions sent to the governors of the proprietary provinces are not so voluminous as those sent by the crown to its governors; they are also less comprehensive and much less exact in form. The usage of no two provinces was the same and in the same province it varied from time to time. The instructions issued by the Carolina proprietors were usually brief, but those sent in 1691 to Philip

[1] *Md. Arch.*, Council, 1636 to 1667, pp. 141, 149, 161.
[2] *Calvert Papers*, I. 131. Hazard, *Annals of Pennsylvania*, 503.
[3] *N. C. Recs.*, I. 93.
[4] Ibid., 97, 95.

Ludwell[1] were so full as to remind one of those emanating from the crown. Section 41 of these ran as follows: "In all other matters not limited or provided for by these our Instructions you our s[d] Governor are by and with the consent of any three or more of our Deputys to make such Orders from time to time for the peace and safety of the Government there as to you shall seem necessary and wee ourselves have power to do by virtue of our Charter from the Crown, w[ch] orders you are forthwith to transmit to us with yo[r] reasons for the making of them, w[ch] orders are to be in force untill wee shall under the hand and seale of the Palatine and three more of the Lords Prop[tors] otherwise direct and no longer." The rule, of general application, that instructions once issued should bind all succeeding governors till revoked, was stated in the next clause: "These Instructions shall be the Rules for proceedeings for any succeeding Governor as well as yorself and be put in Execution by him until wee shall otherwayse direct." In the early history of their province the Calverts do not seem to have issued instructions so regularly as did the Carolina proprietors, or, at least, if they did so, the documents have not been preserved. But as members of the proprietor's family often acted as governors, it may be believed that directions were given by letter when elsewhere they would assume formal shape. But examples of early instructions in Maryland history have been preserved,[2] and after 1660 the number which appear in the records increases. Though in Maryland as in other proprietary provinces, more attention was paid in the instructions to territorial than to governmental affairs, there was no sphere of government which they did not or might not touch. They dealt in particular with the calling of assemblies and with the right of both governor and proprietor to assent to laws. The history of this feature of Pennsylvania government reveals nothing essentially different from what existed in the other provinces.[3]

So far as Maryland is concerned, reference to the official oath will furnish additional evidence that the relation between the proprietor and the governor was such as has been indicated. The oath taken in 1648[4] bound the appointee to defend and maintain the jurisdiction and seigniory of the proprietor to the utmost of his power, and never to "accept of nor execute any Place, Office or Employment within the said Province Concerning or relating to the

[1] *N. C. Recs.*, I. 373.

[2] *Md. Archives*, Council, 1636 to 1667, pp. 51, 99, 135, 139, 324, 329, 335, 385; Assembly, 1637 to 1664, p. 321; Council, 1667 to 1688, pp. 54, 63, 94.

[3] See Shepherd, *History of Proprietary Government in Pennsylvania*, Columbia University Studies, VI. 474, *et seq.*

[4] *Archives*, Council, 1636 to 1667, p. 209.

Government of the said Prov^e^ from any Person or Authority but by from or under a lawful Authority derived or to be derived from time to time under the hand and seal at arms of his said Lordship or his heirs and assigns." The oath of 1669[1] was drawn in the same terms. The commissions issued by the Carolina proprietors and by those of New Jersey required official oaths, but the forms used are not now accessible. It is possible also that they were not regularly administered, especially during the periods of confusion through which those provinces passed. The accessible documents relating to Pennsylvania also furnish no example of the official oath or affirmation of a governor.

The position of the governor will be made still clearer, if we note the powers which were conferred upon him. These are more fully expressed in Maryland documents than elsewhere. In the first extant commission of Leonard Calvert, that of April 15, 1637, we find them stated at length.[2] The military element in the office was placed first. The governor was made lieutenant-general. This is the title by which in early times he was most often designated in the official documents both of Maryland and Carolina. He was also admiral, and by virtue of these powers was organizer and commander of the forces of the province both by land and sea for purposes of defense. Among the civil powers of the governor, that of chancellor ranked first. By virtue of this he was keeper of the seal and issued all grants both of land and office, licenses, writs of election, judicial writs, proclamations. As chancellor also he was provincial judge in equity, and in this capacity sat with the council. The appointing power was closely connected with the office of chancellor. The governor was also chief justice and chief magistrate. The first of these titles shows that he was the common-law judge in the province, exercising the combined powers of the King's Bench, Common Pleas and Exchequer. He was expressly empowered to hear, pronounce judgment, and award execution upon all causes criminal and civil, and to do it as authoritatively as if the proprietor were present. When life, member or freehold were involved the councillors should sit as judges with him. The title of chief magistrate referred apparently to the functions of the governor as conservator of the peace and general executive of the province. From him acting in these capacities proceeded the power of arresting, detaining and binding over offenders, which in the

[1] *Archives*, Council, 1667 to 1688, p. 39.

[2] *Archives*, Council, 1636 to 1667, p. 49. This was really an ordinance of government, for it contained commissions for governor, council and secretary, as well as directions for calling an assembly. Later commissions were an expansion and differentiation of this.

localities was exercised by constables, sheriffs and justices of the peace, and the power to issue and execute ordinances, pardon criminals, establish ports, harbors, markets and fairs, to care for the interests of the province and control its administration in general, supplementing in all needful ways the work done under the other functions, so as to make a rounded whole. By virtue of his power as chief magistrate the governor also became the constituent part of the legislature. It follows from this that within the province the governor was the centre from which proceeded all military, judicial and administrative functions, and also to a large extent legislative activity. From no measure of importance, even in the ecclesiastical sphere, was his hand or influence absent. All this the governor did as the commissioner and representative of the proprietor in the province. His official *status* was derived not from the province but from the proprietor. He was head of the province by virtue of his being intermediary between it and the proprietor. What the documents show to have been his position in Maryland, they also show, though somewhat less elaborately, to have been his place in the other proprietary provinces.

But at the same time that the office of governor was created, provision was made in the proprietary commissions and concessions for a council, which should stand toward the executive in a relation analogous to that occupied by the privy council toward the king in England. By the commission of 1637 the governor of Maryland was commanded to advise with it "as he Shall See cause upon all occations concerning the good of our Said Province and of the people there." That it was associated with the governor in the discharge of the highest judicial functions, we have seen. The councillor's oath, like that of the governor, bound him to bear true faith to the proprietor and defend his rights, maintain the peace and welfare of the people, assist in the administration of justice, give good advice to the proprietor and his governor, and keep secret the affairs of state.[1] According to this oath then the council was a branch of the executive, and as such was under obligation to uphold the rights of the proprietor. In 1642 the council received for the first time a commission distinct from that of the governor.[2] In this it was called "o^{r} privie Councell within o^{r} said Province of Maryland," and its members were empowered to meet with the governor when and where he should direct, "to treate, consult, deliberate and advise of all matters, courses and things w^{ch} shall be discovered unto

[1] *Archives*, Assembly, 1637 to 1664, p. 44; Council, 1636 to 1667, p. 85.

[2] *Archives*, Council, 1636 to 1667, p. 114. Substantially the same language was used in the commission of 1644; ibid., 157, 159.

you or brought before you, as well concerning the quiet govmt and regulating the people there, as for the good and safety of o^r^ said Province of Maryland." The peculiar function of the council then was to advise the governor and through him the proprietor, and in the provinces it was generally true that without that advice the executive should not act. The judicial powers of the council were also discharged in connection with the governor and were provided for in his commission. One would thus infer that as the council could not perform an executive act apart from the governor or an official representing him, so the councillors possessed of themselves no judicial *status* above that of justices of the peace in their localities.[1] And yet the council very greatly increased the strength of the executive because of the political and social influence which it contributed, while its utilization as a part of the legislature was of still greater advantage. Through it the influence of the appointing power was made much more effective than it could have been, if the governor had been left unsupported. The Carolina proprietors and Berkeley and Carteret in New Jersey availed themselves of this support, but Penn, until 1701, neglected it, and made express provision instead for an elective council.[2] His experience with this will appear in the sequel, but it was apparently of such a nature as to convince even the Quaker proprietor that an appointive council was a necessary part of the provincial system. However, when he secured it in permanent form, it was shorn of its direct legislative power.

The governor and council constituted the most important part of the official system of the province. The custom of accumulating offices in the hands of councillors, or, to state it otherwise, of admitting officials to the council, tended greatly to concentrate power in their hands. The other officials whom the proprietor directly appointed were usually the secretary, surveyor-general and receiver-general.[3] In Carolina, after the attempt to procure the acceptance of the Fundamental Constitutions began, each proprietor was expected to appoint a deputy to reside in the province and represent him there. These became a part of the council. In that

[1] *Archives*, Council, 1636 to 1667, p. 159. They are in this commission called conservators of the peace, with authority individually or collectively to arrest, detain and bind over; but when the time for trial came the governor must be associated with them.

[2] A provision for an elective council also appears in the Concessions of West Jersey, which are said to have been drawn by Penn. Clarkson, *Life of Penn*, 69; *N. J. Archives*, I. 265.

[3] *N. C. Recs.*, I. 50, 72, 73, 79, 165, 211, 240. *Md. Archives*, Council, 1636 to 1667, pp. 53, 101, 116, 158, 217, 219; Council, 1667 to 1688, pp. 71, 94. Hazard, *Annals of Pennsylvania*, p. 555. *Pa. Col. Recs.*, II. 61. *Penn and Logan Correspondence*, I. liii. *N. J. Archives*, I. 26, 376, 378.

document too provision was made for a large number of commissioners who were to be members of the various courts and whom the proprietors were to select. In 1643 Lord Baltimore appointed commissioners of the treasury.[1]

The other general administrative and judicial officers of the province, together with the local officers, appear in Maryland, Carolina, East Jersey and Pennsylvania to have been appointed by the governor. This must be qualified by the statement that the more important officials had the right to appoint deputies. In Maryland blank commissions[2] seem to have been sent over to be used in the appointment of sheriffs, justices of the peace, commanders of Kent Island or of the counties, constables, coroners, and in the early time for military officers. These were issued and countersigned by the governor. In later times military officers seem to have been commissioned directly by the governor.[3] The governor, however, was authorized, when occasion demanded, to appoint any civil or military officer and also to suspend officials and appoint their successors.[4] Over the selection of all officials he had great influence, for the proprietor had to rely largely upon him to suggest the names of suitable candidates.

In 1663 the Carolina proprietors, influenced it would seem by the arguments of the New Englanders and of adventurers from the Barbadoes who were petitioning for a grant at Cape Fear, proposed that the settlers should present a list of double the number of names required, from which the governor and councillors should be selected; also that the governor's term of office should be three years.[5] But this did not become a permanent feature of the Carolina system. The concessions of 1665 provided for the appointment of the lieutenant-general by the proprietors. Both governor and councillors, moreover, held during the pleasure of the proprietors, while the latter expressly reserved the appointment of the secretary and surveyor-general.[6] The Fundamental Constitutions, had it been possible fully to execute them, would have necessitated a great extension of the official system and would have strengthened proprietary control over it. To Governor Ludwell in 1691

[1] *Archives*, Council, 1636 to 1667, p. 140.

[2] Ibid., pp. 61, 62, 70, 80, 88, 90, 96, 451, 534, 539; Council, 1667 to 1688, pp. 14, 26, 27, 33, 52, 567.

[3] *Archives*, Council, 1636 to 1667, pp. 75, 86, 102, 103, 117, 118, 124, 528; Council, 1667 to 1688, pp. 10, 12, 13, 113, 120.

[4] *Archives*, Council, 1667 to 1688, pp. 80, 85, 109, 117. The commission issued to Philip Calvert in 1660 empowered him to appoint, temporarily, councillors, a secretary and a receiver-general. *Arch.*, Council, 1636 to 1667, p. 391.

[5] *N. C. Recs.*, I. 36, 41, 44, 154, 156.

[6] Ibid., pp. 79, 85, 97.

not only was authority given to fill certain specified offices, but to appoint all other officials deemed necessary for the administration of the government, but for whom no provision had been made by the proprietors or commissions already issued.[1] That the tenure of office in North Carolina remained unchanged till the close of the proprietary can be shown from published documents,[2] and if the manuscript records of South Carolina are ever printed much more abundant evidence to the same effect may be expected.

That in New York during the proprietary period the officials were wholly appointive and were exclusively controlled by the proprietor and those who exercised the appointing power under him, is susceptible not only of documentary proof, but it follows from the fact that no assembly existed in that province till near the close of its proprietary period, and the few measures which it passed affected the official system in no important respect.

But we find in Pennsylvania, especially during the earlier period of its existence, the system in vogue of filling offices by that combination of election and appointment which the Carolina proprietors seem at the outset to have been tempted to adopt. In his first Frame of Government, which was issued in 1682, Penn declared that, as the affairs of the province must be quickly ordered and settled, he would appoint judges, treasurers, masters of the rolls, sheriffs, justices of the peace and coroners, to hold during good behavior. But the method of filling these offices for which provision was made, both in the first Frame and in the one issued the next year, was this, that the council should present double the number necessary to fill the higher offices, and the assembly in the same proportion for the lower offices, and from these lists the governor should appoint the proper number in each case.[3] Offices seem to have been filled in this way, save during the interruption occasioned by Fletcher's governorship, till 1700 and 1701. Then judges and justices of the peace became by law directly appointive, and if we are to trust the implication of the Charter of Privileges, only sheriffs, coroners and county clerks continued to be chosen according to the old method, and that for short terms.[4] In West Jersey the provincial system was, in regard

[1] *N. C. Recs.*, I. 376.

[2] Ibid., 705, II. 9, 33, 129, 175, 217, 249, 264, 489, 497, 503, 515, 569, 606, 607.

[3] *Pa. Col. Recs.*, I. 35, 45. This method of filling offices was in use among the Dutch, and had been employed in New Netherland. It has also been shown that it was discussed between Penn and his advisers when he was preparing the first Frame of Government. Shepherd, *History of Proprietary Government in Pennsylvania*, p. 228, *et seq.* But no conclusive evidence, to my knowledge, has yet come to light to show that Penn and his friends got this suggestion from the Dutch.

[4] *Col. Recs.*, II. 58, 232. *Statutes at Large of Pa.*, II. 134, 148.

to tenure of office, much more seriously modified than it was in Pennsylvania. There, according to the Concessions of 1677, not only was the legislature given the power to choose the councilmen who should administer the affairs of government when the assembly was not in session, but also the commissioners of public seals, treasurers, chief justices and collectors.[1] Justices of the peace and constables were to be chosen by the people, presumably in the localities. In November, 1681, it was enacted as a "fundamental" by the legislature of West Jersey that all officers of state or trust in the province should be nominated and elected by the general assembly or under its regulations, and that these officers should be accountable to the assembly or to such as it should appoint.[2] The acceptance of this and of several other "fundamentals" was made the condition of the recognition by the assembly of Samuel Jennings, the appointee of the proprietor Edward Byllinge, as deputy-governor. In 1683 Jennings was actually elected governor,[3] though in the Concessions there was no provision that he should either be recognized or elected. The records show that as long as proprietary government lasted in West Jersey the general assembly continued to elect nearly all of the officials of the province—the councillors, commissioners for dividing and regulating land, commissioners for buying land of the Indians and selling the same to discharge the public debts, clerk and recorder, surveyor, high sheriffs, constables for the respective tenths.[4] In 1683, after the East Jersey proprietors had reached the number of twenty-four, a "fundamental constitution" was issued for that province, which provided that many of the officials, both of the province and of the localities, should be elected.[5] But this "constitution" never went into effect,[6] and therefore in East Jersey the system of appointment which had been established by the first proprietors remained substantially unchanged. In that province, unlike West Jersey, the resident proprietors never became so numerous as to constitute even approximately a majority of the voters, and hence, even had it been desired, the democratizing of the province was a task of much greater difficulty.

By showing thus that the proprietor was the immediate source of office in his province, and that by instructions and the oath he

[1] *N. J. Archives*, I. 243, 265, 266.

[2] Leaming and Spicer, *Grants and Concessions*, 424.

[3] Gordon, *History of New Jersey*, 43. Mulford, *History of New Jersey*, 243, 244.

[4] *Grants and Concessions*, 457, 467, 491, 536, 544, 569, 579. Election was the regular business of the first day of the session. In this respect the general assembly resembled a court of election in the corporate colony.

[5] *N. J. Archives*, I. 395 *et seq.*

[6] Mulford, 219.

legally maintained a permanent connection therewith, a long step has been taken toward an explanation of the nature of the provincial system of government. But it may be still further illustrated by considering that the proprietor was potentially the immediate source of honor, as well as of office. If its feudal nature were to be preserved intact, the existence within the province of a nobility would be a matter of great importance. In all the charters granted by the crown to proprietors, except that of Pennsylvania, authority was given to bestow titles of nobility. Neither Gorges nor Baltimore attempted to exercise this power, though there are indications that the latter for a time contemplated something of the sort. The Carolina proprietors, in order the better to secure their official and aristocratic interests "with equality and without confusion," gave the plan for a nobility a permanent place in their Fundamental Constitutions. The character and fate of this plan are too well known to demand extended notice here. It failed "by Reason of the want of Landgraves and Cassiques," and that was due to the fact that these titles were worthless in Europe, and that in the colonies at that time there was neither population nor wealth sufficient to form the basis of a nobility. Just here there appears with great clearness the process of levelling to which the palatinate was even at the outset subjected, when it was reproduced on this continent. In some respects the governmental machinery of the province was far superior to that of the palatinate and more highly developed, but it was in those features which fitted it for modern and semi-popular uses. The monarchical features of the palatinate or of the kingdom could be reproduced in the province, because they are consistent with society of a democratic type. But an aristocracy, both as a form of society and as a system of government, is inconsistent with modern colonial conditions.

But though the proprietors found it impossible to create a nobility, and the Quaker proprietors would have repelled the suggestion that they desired such a thing, the governmental institutions of the province were established by them, and that mainly through the exercise of the ordinance power. This was done in accordance with their charter rights, and was closely connected with the exercise of the appointing power. It remains now to be seen how, on the basis of an official system which in the normal province was the creation of the proprietor, the judicial, military and legislative institutions in a colony of this type originated.

As we have seen, the highest court in the proprietary province in the early stages of its history, was created by the appointment of the governor and council. This is true both of Maryland and

of Carolina. The Provincial Court of Maryland apparently consisted of the governor and council until 1692. Then it seems that the two bodies became distinct, though leading men of the province frequently sat as members of both. In North Carolina the earliest extant records show that the general court consisted of the deputy-governor, the deputies of the proprietors, and at least one assistant or associate.[1] This was in 1694. The court appears in this form in 1695.[2] But in October, 1702, it apparently begins to act under a commission distinct from that of the council or the proprietors' deputies. Then its commission was published and the oath of office was taken by three judges.[3] In March, 1703, two other judges took the oath. We have no further records of the court till March, 1713, and then the bench consisted of a chief justice and associate justices. The chief justice was appointed by the proprietors, and at least during and after Governor Eden's administration he appointed the associate judges.[4] In Pennsylvania the provincial court became differentiated from the council almost immediately. In 1684 an act was passed which provided that five judges should be appointed by the governor, any three of whom should constitute this court. Twice yearly they should sit in Philadelphia, and in both spring and fall at least two of them should go on circuit through the counties of the province and territories.[5] Whether the court was established thus early as a distinct body because the council was elective or whether the proprietor and early settlers of Pennsylvania were seeking in this case a closer imitation of English usage than usually obtained in the colonies at the outset, the province never abandoned the principle of the act of 1684. There was much subsequent legislation, and no little controversy over the establishment of courts, both with the home government and between the governor and assembly; as in the other provinces also the governor and council in early times continued occasionally to discharge judicial functions; but Pennsylvania adhered from the outset to a judiciary which should be as distinct as possible both from the legislature and from the executive.

Of the lower courts in the proprietary province those of the manors may be disregarded, because they played a part of no importance in the American judicial system. So far, however, as they existed, they were the creations of the executive and not of the legislature. Of the local subdivisions of the province which were used

[1] *N. C. Recs.*, I. 405.
[2] Ibid., I. 442.
[3] Ibid., 566.
[4] *N. C. Recs.*, II. 80, 148, 217, 264, 299, 535.
[5] *Charter and Laws of Pa.*, 168, 184, 225.

for governmental purposes—towns, hundreds and counties—the last were by far the most important and may here be taken to illustrate the point in view.[1] For the establishment of a county two acts were essential and decisive, the fixing of its bounds and the creation of the county court. In the early history of the proprietary province the fixing of the bounds of counties was the work of the proprietor, and was done through his governor, the council, and the officers connected with the territorial administration. With that side of proprietary activity it was closely allied. In Maryland St Mary's County at first comprised all the settled part of the province Its bounds were generally defined by the formation of outlying counties. Of the order of 1650 fixing the bounds of Charles County, and that of 1654 repealing the above ordinance and erecting and bounding Calvert County, the record has been preserved.[2] The orders for the erection of Somerset County and for the attempted erection of Worcester County on Delaware Bay are exceptionally detailed.[3] The records of the origin of the other Maryland counties which were created by prerogative in the seventeenth century do not appear.

But the more important act was the creation of the county courts. In most cases the proprietor began the establishment of these by the appointment of their officers. In January, 1638, John Lewger was appointed conservator or justice of the peace within St. Mary's County.[4] James Baldridge was at the same time appointed sheriff and coroner. Thus the officials whose presence was necessary to the existence of a county court were in being, but for some years at the outset the governor and council seem to have acted as the court of St. Mary's County. December 30, 1637, Capt. George Evelyn was appointed by the governor as commander of Kent Island, with the criminal and police jurisdiction of a justice of the peace and civil jurisdiction in cases involving £10 or less.[5] Probably on account of the remoteness of Kent Island and the difficulties with Clayborne, the commander was authorized to appoint all officers necessary for the preservation of the peace and administration of justice there, and especially a council of six or more with whom to consult respecting all important matters. Notwithstanding this, and though there is no proof of Evelyn's removal, the fol-

[1] What is here said concerning the counties applies with equal force to towns and hundreds. In reference to the hundred in Maryland see *Archives*, Council, 1636 to 1667, pp. 59, 70, 89, 91; Assembly, 1637 to 1664, p. 145 *et seq.*

[2] *Archives*, Council, 1636 to 1667, pp. 259, 308.

[3] *Archives*, Council, 1667 to 1688, p. 108.

[4] *Archives*, Council, 1636 to 1667, pp. 60, 85.

[5] Ibid., p. 59.

lowing February[1] three other justices of the peace were appointed by the governor for Kent Island and given the authority to hold there a "court leete." A sheriff and a coroner were appointed at the same time. Other appointments and orders follow, till in 1642 Giles Brent was made commander and two county commissioners were appointed.[2] It was at that time that Kent Island appeared definitely as a county.[3] When Charles and Calvert Counties were erected we have record of the appointment only of a commander in one case and of a sheriff in the other. But in June, 1661, after the disturbed period of the Commonwealth had passed, an elaborate commission[4] of the peace was issued, appointing a board of justices for each of the counties then existing in the province. Such commissions were renewed at intervals thereafter.[5] But of these counties, only one had been erected by act of assembly. That was Ann Arundel, and it was created by a law of 1650.[6] No other act for a similar purpose was passed till 1695.[7] Hence, with one exception, the original counties of Maryland were created, that is, their bounds were fixed, courts established, magistrates appointed, and to an extent the jurisdiction of the courts was determined, by prerogative. The institutions thus founded were developed and perfected by the proprietor in his legislature. Statutes providing for this appear in the eighteenth century, but they simply elaborate the details of a system already established by ordinance and custom.

Power to erect counties was given to the Carolina proprietors in their charters, but, as interpreted by them at the outset, it meant the subdivision of the vast territory they received into a number of provinces, each with a governor and assembly. These, however, were called counties.[8] In the concessions of 1665 the proprietors speak of "the county of Clarendon, the county of Albemarle, and the county of ——, which latter is to be to the southward or westward of Cape Romania, all within the province aforesaid." But the

[1] *Md. Archives*, Council, 1636 to 1667, p. 62.

[2] Ibid., pp. 80, 90, 97, 105. Assembly, 1637 to 1664, p. 55.

[3] In 1695 Kent Island was annexed to Talbot County.

[4] Ibid., p. 422.

[5] Ibid., pp. 448, 471, 534, 537. Council, 1667 to 1688, pp. 14, 33, 52, 97. Sheriffs and coroners were appointed in the same way, save for a few years subsequent to 1662, when a law was in force that sheriffs should be appointed from lists presented to the governor by the county justices.

[6] *Archives*, Assembly, 1637 to 1664, pp. 283, 292.

[7] Bozman, *History of Maryland*, II. 246 n.

[8] *N. C. Recs.*, I. 44, 79 *et seq.* In 1663 these proposed subdivisions were called by the proprietors colonies. In the "proposals" of that year they spoke of the settlement near Cape Fear as "the first colony." We have here a reminiscence of the language applied in 1606 to Virginia. But I have not found the settlement on the Chowan or that south of Cape Romania referred to as the second colony.

government planned for them, and which developed in Albemarle County, was provincial. Each was intended to be a county palatine, rather than a county in the modern sense of the term. But in the Fundamental Constitutions the modern county appears. The number created was to be the same as the number of landgraves, and they were to be increased as settlement progressed. Each county was to contain eight seigniories, eight baronies and four precincts, each precinct to include six colonies. That would make the area of each county to be 480,000 acres,[1] three-fifths of which was to be open for settlement and two-fifths to be held as seigniories and baronies. In every county there should be a court consisting of a sheriff and four justices, one for each precinct, and all to be commissioned by the palatine's court.[2] Neither was the civil or the criminal jurisdiction of these tribunals limited, save by the right of appeal to the proprietor's court in personal causes involving more than £200, and in any cause involving title to land, or any criminal cause on payment of £20 as security.

The Concessions and Agreement of 1665 provided at length for an assembly, and among its powers appears[3] that for "constituting all courts for their respective counties, together with the limits, powers and jurisdiction of said courts;" also the officers, their number, titles, fees and perquisites. These Concessions were repeated in instructions to the governor of Albemarle in 1667.[4] But from the records as preserved it cannot be proved that courts were established in Albemarle County under acts of assembly. If the intentions of the proprietors ever were designedly so liberal as is indicated by the Concessions of 1665, they abandoned that attitude and policy when they published Locke's Constitutions. Their instructions from that time are drawn in the spirit of the Constitutions and not of the Concessions. The acts of the first assembly of Albemarle (January, 1670), so far as ratified by the proprietors, have been preserved, and none of them provides for the establishment of courts. In one of them the court of the governor and council is referred to as in existence. This was to be expected, and probably it was the only one in the little settlement. The instructions of 1670 to the governor and council of Albemarle[5] empowered them to establish such and so many courts as they should think fit, till "our Grand Modell of Government" could be put into execution. That, as we know, provided for an elaborate judicial system to be established by ordinance, after the Constitutions had been

[1] Arts. 3 and 4.
[2] Art. 61.
[3] *N. C. Recs.*, I. 82.
[4] Ibid., p. 168.
[5] Ibid., p. 182.

accepted. In the instructions to the governor and council of Albemarle in 1676, they were commanded not only to administer justice themselves according to the laws established, but to propose in the assembly the passage of laws for jury trial in criminal cases, as provided for in Article 69 of the Fundamental Constitutions, and for bail pending trial. In the instructions issued to Governor Henry Wilkinson in 1681 [1] he was empowered, with the advice of the council, to establish such courts as he should think fit, till the Fundamental Constitutions could be put into operation. Ludwell, in 1691, was instructed, with the consent of three of the proprietors' deputies, to appoint a judge and four justices to try cases in any of the counties which had fifty freeholders qualified to serve on juries.[2] In 1692 the assembly of South Carolina admitted that the power to erect courts belonged to the proprietors, though the claim was made that it should be regulated by law.[3] The extant records of the court of Perquimans Precinct, apparently the earliest records of a county court which have preserved in North Carolina, begin in 1693.[4] In 1733 Governor Burrington had a controversy with two members of the council about the right to erect precincts and was able to show that, save in the case of one precinct formed in 1722, all had been erected without the co-operation of the legislature. By an act of 1715 the legislature recognized as legal units of representation the precincts which down to that time had been established by ordinance.[5]

The records indicate that in both the Jerseys the proprietors in establishing counties and courts acted mainly through the legislature, but in New York Yorkshire with its ridings was created by Governor Nicolls, and in the Duke's Laws, which were published by proclamation, provision was made for the holding of courts of sessions in each riding.[6] But the county system was by the acts of 1683 and 1691 remodelled and extended through those parts of the province which were inhabited by the Dutch.

When in 1664 the English took possession of the Delaware, local government there was continued without interruption. The Dutch magistrates were continued in office till successors were appointed and government established under English titles and forms.[7] But both the officers who were displaced and those who succeeded were appointed by their superiors at New York. Governors Nicolls, Lovelace and Andros appointed constables, surveyors,

[1] *N. C. Recs.*, I. p. 334.
[2] Ibid., p. 375.
[3] Rivers, p. 434.
[4] *N. C. Recs.*, I. 386.
[5] *N. C. Recs.*, III. 444 *et seq.*
[6] *Charter and Laws of Pennsylvania*, p. 20.
[7] *Pennsylvania Archives*, 2d Series, V. 544, 551, 572.

sheriffs and other officials for the keeping of the peace and the administration of justice on the Delaware,[1] and fully controlled them in the performance of their duties. By these acts three courts were established, one at Upland, another at Newcastle and a third at the Whorekills. Each was provided with justices, a sheriff and a coroner.[2] They were then county courts and later came to be so known. Sessions continued to be held with considerable regularity. The records of the court at Upland have been preserved[3] and show that it continued without interruption till it became the court of Chester County, Pennsylvania. The region within the jurisdiction of the two other courts was annexed to Pennsylvania in 1682 as the Three Lower Counties of Newcastle, Jones (later Kent) and Deal (later Sussex). Upland and Newcastle had been known as counties at least since 1678.[4] Jones and Deal were, it would seem, separately organized within four months after Penn received from the Duke of York the deed which it was supposed transferred to him the Delaware region.[5] At the same time, in addition to Chester, Philadelphia and Bucks counties were established in Pennsylvania. This all was done before the first assembly of Pennsylvania met at Chester.[6] In the first and second Frames of Government, moreover, the proprietor vested in the governor and council the right to establish courts. To the council and assembly he gave the privilege, already referred to, of nominating double the number of candidates for justices and other court officers, from which lists the governor made appointments. In this way the earliest county courts in Pennsylvania were brought into existence, by the exercise of the ordinance power and in harmony with English custom. But legislation regulating the jurisdiction of these and the other courts of the province began in 1683 and continued steadily thereafter. The other counties of the province also were erected by law, Lancaster in 1729 and the others at later dates.[7]

The relation in which at the outset the proprietor and governor stood toward the system of defence was the same as that which he bore toward the courts of the province. As we have seen, the proprietor, by virtue of the authority he had received from the king,

[1] *Pennsylvania Archives*, 2d Series, V. 585, 597, 598, 600, 615, 618, 619, 649–654, 686, 689, 690, 697, 728; VII. 818. *Charter and Laws of Pennsylvania*, 446 *et seq.*

[2] Edmund Cantwell was high sheriff of the river. *Archives*, V. 619. See the official lists in *Pa. Archives*, 2d Series, IX. 644 *et seq.*

[3] *Record of the Upland Court*, *Memoirs of the Historical Society of Pennsylvania*, VII.

[4] Ibid., p. 119.

[5] Hazard, *Annals of Pennsylvania*, pp. 602, 605, 606.

[6] Ibid., p. 607.

[7] *Charter and Laws of Pa.*, p. 127. Miller, *Laws of Pa.*, fol. 1762, II. 23, 27, 36, 38. Franklin, *Laws of Pa.*, p. 359.

made his governor commander of the forces by land and sea. All officers, military and civil, whose duties might contribute toward the work of defence, were commanded to obey him. In the commissions, particularly those of Carolina, the military powers of the governor stood in the forefront, and he was empowered to resort to all measures which were necessary for defence. As Pennsylvania, however, developed no militia system till compelled to do so by the ravages of the enemy during the last intercolonial war, she can in this connection safely be left out of account. Of provisions for defence in the Jerseys, while under the proprietors, traces are very faint. Their protected position combined with other causes to divert attention from such measures and cause them to seem unnecessary. But Maryland, Carolina and New York provided for defence according to characteristic proprietary methods. In them all military officers were appointed and commissioned by the governor.[1] The system of training was under his direction, and when expeditions were fitted out he gave orders, directions and instructions both before and after the troops had set out upon the march. In Maryland he occasionally commanded in person. The enforcement of the assize of arms was ultimately a duty of his, as was the procuring of supplies of all kinds and the keeping of a magazine. The work of building, repairing and garrisoning forts also devolved upon him. The subordinate officers in Maryland through whom the governor acted were in early times the captain of the band of St. Mary's, the captain of the band of Kent Island, the commanders of the counties. From time to time commanders were appointed for special expeditions, against either the Indians or the various enemies of the province, internal and external. Thomas Cornwallis was repeatedly summoned[2] to such a duty as this. When after 1660 the raids of the Five Nations against the southern tribes became frequent, expeditions had several times to be organized to restore quiet in the northern part of the province. The soldiers for these were raised by draft upon those liable to military service in the counties.[3] In 1658, by order of the governor and council, captains were appointed to command and train the militia in various specified sections of the province.[4] We presently find that the trained bands of St. Mary's County were already formed into a regiment under a colonel.[5] This probably was the beginning of the organization of the entire militia system with the county as a unit. The office of

[1] *Md. Archives*, Council, 1636 to 1667, pp. 75, 86, 88, 102, 103, 127, 131, 344, 349, 392, 409, 427, 522; Council, 1667 to 1688, pp. 10, 12, 14, 21; Council, 1688 to 1693, pp. 45, 56, 66, 67. *N. C. Recs.*, I. 84, 97, 171, 194, 336, 695, 780.

[2] *Arch.*, Council, 1636 to 1667, p. 131.

[3] Ibid., 416, 422

[4] Ibid., 344, 349, 351, 401.

[5] Ibid., 392.

muster-master-general was revived and bestowed on the colonel of the St. Mary's regiment.[1] Whether the system of county regiments had come fully to prevail before the institution of royal government in Maryland the authorities do not clearly reveal. That it had not done so in New York at the close of the proprietary period is shown by the statement of Andros in 1678, that the militia then consisted of companies for the most part with less than one hundred men each.[2] The system of training and service by companies, for which provision was made in the Duke's Laws, was not materially changed till after the permanent establishment of counties in New York. Of the militia system in Carolina during the proprietary period, save the general fact of the extent of the governor's legal control, we get no satisfactory information in the extant records.

In the development of government war and finance are always closely connected, and largely through this connection has the legislature been able to win its position of leadership. The history of Maryland furnishes an illustration of this. The heaviest expenses of its government were incurred in its military expeditions. The right to raise all revenue, which did not accrue in the form of rents, alienation fines and fees, belonged to the general assembly. It early made use of this right as a means of limiting and regulating the exercise of the proprietor's powers in the domain of military affairs. In 1650 a law was passed[3] providing that freemen should not be compelled to serve outside the province, and that martial law should be enforced only within a camp or garrison. In 1661 an act was passed prescribing the quota which should be raised from each county for a prospective expedition against the Indians, and the wages of the officers and soldiers.[4] The governor and council were empowered to raise the amount which was necessary by a poll-tax according to the custom of the province. If it was deemed necessary, they might also, during the recess of the assembly, raise additional forces. In 1676[5] a very comprehensive act was passed which prescribed the settled policy of the province in reference to training, the raising of supplies for war, the amount of wages which should be paid, the providing of pensions for the disabled, and the impressing of provisions. The act explicitly defined the mode of raising the revenue which should be required and provided that certain members of the assembly should see that it was expended for the purpose designated. Regularly, from the

[1] Ibid., 215, 409, 545.
[2] *N. Y. Col. Docs.*, III. 260, 263. *Charter and Laws of Pa.*, 38.
[3] *Arch.*, Assembly, 1637 to 1664, p. 302. McMahon, *History of Maryland*, p. 161.
[4] *Arch.*, Ass., 1637 to 1664, p. 407.
[5] *Arch.*, Ass., 1666 to 1676, p. 557.

first, revenue had been appropriated for the proprietor's use, but this act shows, perhaps better than any other which was passed during the early period, how the tax-granting body by availing itself of financial needs created by war could effectively limit the exercise of the prerogative.

It has now been shown, so far as space and published records will allow, that the proprietor was in the full legal sense the official and administrative head of the province. In the Fundamental Constitutions of Carolina his executive powers were distributed among a board of eight, so that each should hold one of the great offices of state and a court should result which should be a reflection of the English court, as it was in the later Middle Age or during the period of the Tudors. The powers which in the case of Carolina were analyzed and distributed in this way, were in the other proprietary provinces, with the exception of New Jersey, centered in the hands of an individual. The proprietor of Maryland, for example, was his own admiral, constable, chancellor, chamberlain, chief justice, high steward and treasurer,[1] and exercised these powers either in person or by delegation. An obligation to obey the proprietor, as the one in whom these powers met, rested then upon the inhabitants of the province, and it was briefly and authoritatively stated in the oath of fidelity. As we have seen, the taking of this oath was one of the conditions of the socage tenure. It was required in the corporate colony, though the rent, which was the other condition of the tenure, was not mentioned in the land-grants. The influence of tenure in the colony of that type may be said to have vanished, and the oath, as there taken, to have implied a purely political obligation. Provision for it was made by an act of the general court, and in Massachusetts, for example, the oath bound the freeman to obey and support the government of the commonwealth, not to plot any evil against it, but instead to reveal to the proper authorities plans of this nature as soon as their existence should be known. In giving his vote the freeman promised to seek conscientiously the public weal without respect of persons or fear of any man. The only difference between the oath of the resident and that of the freeman[2] consisted in the omission from the former of this last provision. But in the oath of fidelity as imposed in the proprietary province appears the element of personal fealty which was so characteristic of the feudal relation. Moreover, it was due to the proprietor as of

[1] The statement of Sir Ferdinando Gorges in the *Briefe Narration* concerning his plans for the government of his province furnishes another illustration in point. Baxter, *Gorges and the Province of Maine*, II. 66.

[2] *Mass. Recs.*, I. 115, 117.

right and not as the result of legislative enactment. In Maryland, as administered in 1643,[1] the oath contained a solemn promise to obey the proprietor and his heirs in temporal matters as the absolute lords and proprietors, and to defend and maintain their royal jurisdiction and dominion over the land and people of the province, as granted in the charter. His territorial rights were also recognized by the engagement not to receive or purchase any lands in the province from those—even Indians—who did not derive their title to them from the proprietor, and to hold them only "to the use of the said Lord or Proprietor." The personal element in the oath appears very clearly in the form prescribed in 1648. "I . . . do Swear that I will bear true faith unto his Lordship and to his heirs as the true and absolute Lords and Proprietarys of the said Province, and . . . will at all times, as Occasion shall Require, to the utmost of my Power defend and maintain all such his said Lordship's and his heirs' Right, Title, Interest, Priviledges, Royal Jurisdictions, Prerogative Proprietary, and Dominion over and in the said Province of Maryland . . . and over the People who are and shall be therein," according to the powers specified in the royal charter.[2] Among the bills which in 1639 for some unknown reason failed to become law, but all of which embody ideas held in the province at the time, was one[3] defining the crime of treason against the proprietor in terms borrowed from the statute of Edward III. and providing that it should be punished in the same way as treason against the king. In 1642 a law[4] was actually passed which affixed the penalty of death, forfeiture of goods and corruption of blood to the crimes which were mentioned in the bill of 1639, but they were no longer expressly termed treason. As soon as the influence of the Puritans who settled at Annapolis appears in the affairs of the province, we find them protesting against the words "absolute lord" and "royal jurisdiction" in the oath, as "far too high for a subject to exact, and too much unsuitable to the present liberty which God had given the English subjects from arbitrary and popish government." Therefore from the oath which was prescribed in 1650 by a legislature in which the Puritan element was strong the objectionable phrases were omitted and the words "just and lawful" introduced to signify the kind of authority which the colonist obligated himself to obey.[5] But this oath contained the additional require-

[1] *Arch.*, Council, 1636 to 1667, p. 145.

[2] Ibid., p. 196.

[3] *Archives*, Assembly, 1637 to 1664, p. 70.

[4] Ibid., p. 158.

[5] Bozman, II. 403, 423, 671. *Arch.*, Council, 1636 to 1667, p. 299. Substantially the same form was in use in 1681. *Arch.*, Council, 1667 to 1688, p. 310.

ment that the individual taking it should with all speed reveal any plot against the person or rights of the proprietor, the existence of which should come to his knowledge. The oath of fidelity was administered not only to officials and members of the assemblies, but after 1648, save for a time during the troubles of the Commonwealth,[1] to all who received a grant of land in the province.

The Carolina proprietors required that their governors, the councillors, assemblymen, all officials of the province, and all who would receive grants of land or enjoy political rights should take not only the oath of allegiance to the king, but that of fidelity to themselves.[2] The latter required that they should be faithful to the proprietors, promote the peace and welfare of the province, and discharge with fidelity the trusts imposed upon them. Those who could not swear should subscribe, and the subscription should be as binding as the oath. But the proprietors of Carolina never went to the extreme of claiming or countenancing the idea that the crime of treason could be committed against them. Conspiracy and rebellion against their government they interpreted to be treason against the king.[3] This was the attitude assumed by all proprietors subsequent to the Restoration. The requirements of the Carolina proprietors were reproduced in New Jersey, and in a proclamation issued in 1668 to the inhabitants of Middletown and Shrewsbury they were forbidden to vote or hold office without taking the oaths.[4] That a similar oath was administered in New York there is abundant evidence.[5] In Pennsylvania again the situation was peculiar because of the number and influence of the Quakers. But even there it was enacted by the assembly at Chester in December, 1682, that all officeholders in the province and all who had the right to choose or be chosen members of the assembly, should subscribe a declaration of fidelity to the proprietor, his heirs and assigns, and should not "consent to nor conceal any person or thing whatsoever to the breach of this solemn engagement." This was afterwards placed among the "fundamental laws," which, like the Frames of Government, could be amended or repealed only by the consent of the proprietor and of six-sevenths of the members of the provincial council and assembly.[6]

[1] *Arch.*, Ass., 1637 to 1664, p. 348. Bozman, II. 514. *Arch.*, Council, 1636 to 1667, pp. 226, 228, 256, 334, 469.

[2] *N. C. Recs.*, I. 80, 166, 181, 334.

[3] Ibid., 345, 368.

[4] *N. J. Archives*, I. 30, 48, 58. For the administration of the oaths of allegiance and fidelity in later times see the *Records of the Governor and Council of East Jersey*, 1682 to 1703, pp. 5, 102.

[5] *N. Y. Col. Docs.*, III. 71, 74, 331.

[6] *Charter and Laws of Pennsylvania*, 122, 154.

It is clear then that in the proprietary province the oath of fidelity was the equivalent of the oath of allegiance in the kingdom. That it was so regarded is shown in the case of Maryland, by a letter from the council to the proprietor, written in January, 1689.[1] At that time the spirit of revolt was appearing which culminated in Coode's rebellion. In 1684 the proprietor had informed the assembly that for the future he expected every member of it to take the oath. Two years later the council proposed that it be taken, but the assembly excused itself. Again in 1689 the council forced the subject on the attention of the assembly, and told them that "fidelity was allegiance, which by the laws of England might be proposed even to the House of Commons in Parliament sitting, and that the refusal of allegiance did imply rebellion . . . . ." After some opposition the oath was taken by all save one member, who was a Quaker.

HERBERT L. OSGOOD.

(*To be continued.*)

[1] *Arch.*, Council, 1688 to 1693, p. 62.